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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1560

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES GYPSUM COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENTS' JOINT BRIEF IN OPPOSITION.

(SEE INSIDE FRONT COVER FOR LIST OF COUNSEL FOR RESPONDENTS JOINING HEREIN.)

Dated: July 6, 1977.

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OPINIONS BELOW.

The Court of Appeals' opinion is reported at 550 F. 2d 115 and printed as Appendix A to the Petition. There is no District Court opinion on the issues on which petitioner seeks review, respondents having taken a direct appeal from the judgments entered on the jury's verdicts. The District Court's opinion printed as Appendix D to the Petition and reported at 383 F. Supp. 462 deals with an issue on which petitioner has not sought review.

JURISDICTION.

The basis upon which this Court's jurisdiction is invoked is set forth in the Petition at 1-2. On May 25, 1977, this Court extended the time for filing this Brief in Opposition to July 6, 1977.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

The Petition raises the following questions for review by this Court:

1. Whether verification directly with a competitor of a customer's claim of a more favorable price offer constitutes a *per se* violation of Section 1 of the Sherman Act, when the purposes of such verification are to prevent customer fraud and to satisfy requirements of the "good faith meeting competition" defense under Section 2(b) of the Robinson-Patman Act.

2. Whether the trial court erred in its instruction that, if verification had a stabilizing effect on price, the jury should "presume, as a matter of law" in a criminal case that respondents' purpose in verifying was unlawful, regardless of their actual purpose.

3. Whether the trial court's insistence on a verdict "one way or the other" from a "hopelessly deadlocked" jury, its repeated use of "dynamite" charges, its private conference with the jury foreman from which defendants were excluded, its refusal of access to a transcript thereof, and its denial of post-trial jury interviews, coerced a verdict and deprived respondents of a fair jury trial.

4. Whether the trial court erred in refusing adequately to instruct the jury on the "scope and purpose" of the conspiracy and the need to determine separately each respondent's knowledge and participation therein.

5. Whether the trial court erred in refusing to permit the jury to consider vigorous price competition and other circumstantial evidence as proof of respondents' withdrawal from, and abandonment of, the alleged price fixing conspiracy.

If the Petition is granted, respondents will raise the following additional issues in support of the judgment of the Court of Appeals:

6. Whether, assuming petitioner's view of the legality of price verification is adopted by this Court, the new rule of law thus fashioned should be applied retroactively to respondents in this criminal case.

7. Whether the prosecution's egregious, repetitive misconduct throughout the trial deprived respondents of a fair trial.

8. Whether the trial court committed prejudicial error in its jury instructions:

(a) By refusing to give a "Kotteakos" type instruction on single rather than multiple conspiracies, which was requested and promised by the trial judge.

(b) By refusing properly to instruct the jury, in a criminal case, on the relevance of legal advice given respondents that verification was lawful.

(c) By refusing to comply with Fed. R. Crim. P. 30 by informing counsel of his jury instructions, in advance of closing argument, in view of the numerous erroneous, contradictory and confusing instructions.

9. Whether the trial court committed prejudicial error in its evidentiary rulings:

(a) By admitting prejudicial hearsay testimony.

(b) By admitting inflammatory evidence of prior litigation and complaints to the government.

(c) By admitting evidence of disposition of documents pursuant to one respondent's long-established document retention policy.

(d) By reading to the jury hearsay grand jury testimony of a deceased witness regarding events occurring 12 years prior to the indictment.

(e) By admitting irrelevant evidence and documentary evidence not properly qualified.

STATUTES INVOLVED.

The relevant parts of Section 1 of the Sherman Act (26 Stat. 209, as amended, 15 U. S. C. 1) and Section 2 of the Robinson-Patman Act (49 Stat. 1526, as amended, 15 U. S. C. 13) are printed in the Petition at 2-4.

COUNTERSTATEMENT OF THE CASE.

The Court of Appeals, being "convinced" that reversal was required after "thorough scrutiny of the voluminous record and careful consideration of the many issues raised on appeal" (App. A 12a),[1] reversed respondents' convictions under Section 1 of the Sherman Act, 15 U. S. C. § 1, and remanded for a new trial. The prosecution's petition for rehearing *en banc* was denied by the full Court of Appeals on March 10, 1977 (App. C 73a-74a), and a Petition for Certiorari was filed in this Court on May 9, 1977.[2]

Judges Hunter and Adams joined in ordering reversal because of the trial court's refusal to permit the jury to consider respondents' lawful purpose to comply with the Robinson-Patman Act in determining whether limited exchanges of competitive information violated the Sherman Act (App. A 13a). Judge Hunter was of the view that reversal was also required because of incorrect instructions dealing with participation of individual defendants in the alleged conspiracy, and evidence of withdrawal from it.

Judge Adams reinforced the judgment of reversal in a concurring opinion (App. A 40a-50a) detailing the facts supporting his conclusion that the trial court coerced the verdicts by conveying to the jury the clear impression that the court wanted a verdict "one way or the other" (App. 4069a). Judge Adams pinpointed the fact that a "critical dialogue between the trial judge and the foreman [from which counsel were excluded]

1. As in the Petition, "App." refers to the Appendix in the Court of Appeals and "App. A" etc. refers to Appendices A through E printed in the Petition. "Tr." refers to the Trial Transcript.

2. It is not accurate to conclude, as the Petition does, that the prosecution "prevailed on all of the other issues in this case . . ." (Petition 16). Since the verdicts were reversed and the case remanded for a new trial, the Court of Appeals did not have to, and did not, decide all of the many issues raised on appeal.

occurred immediately after the court learned that the jury was so 'hopelessly deadlocked' that the case was 'not going to be settled by any document, any remembrance of testimony' " (App. A 49a). He also concluded that it did not appear that the trial court's subsequent report to counsel on the substance of that private discussion "was accurate or even substantially accurate" (App. A 44a-45a).[3]

Notwithstanding the vast amount of evidence adduced during the 19-week trial, the prosecution's case was entirely circumstantial. It was dominated by evidence of unconnected events occurring well before commencement of the period open to attack under the applicable statute of limitations.[4] The Court of Appeals found it significant that "[o]ver a period of five months the Government introduced masses of evidence *concerning a multitude of seemingly unrelated events* and attempted to link them together to show a single, overall conspiracy to stabilize the prices and marketing conditions of gypsum wallboard."[5] (App. A 29a-30a; emphasis added).

3. Judge Adams summarized the deficiencies:
> Significantly, the judge did not tell counsel about the foreman's opinion that the jury was hopelessly deadlocked; did not indicate that the foreman was under the impression that the court wanted a definitive verdict either for the prosecution or the defendants; and did not mention the directive to the jury that it should "see if [it] can come to a verdict." (App. A 44a.)

The trial judge denied respondents' timely request for a transcript of the conference (App. 4031a), and respondents gained access to the transcript only by an order of the Court of Appeals after appeals had been taken (App. 4062a).

4. The statutory period began on December 27, 1968, five years prior to return of the indictment on December 27, 1973. 18 U. S. C. § 3282. Very late in the trial, even the trial court noted the prosecutor's "absolutely massive and gross detailed questioning" about the pre-statutory period, and admonished the prosecutor to desist in ". . . massive questioning as to '61, '62, '63, '64, and nothing within the statutory period . . ." (App. 3375a-3376a).

5. This same evidence, and respondents' price verification practices, were the subject of earlier private treble damage actions [see *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295

(Footnote continued on next page.)

Thus, unrelated episodes such as price and credit terms changes made in 1965 and 1966, discussions concerning allegedly uniform shipping and handling practices in those years, and alleged predatory practices in Texas in 1961 were offered to prove the 13-year continuing conspiracy charged in the indictment.

The prosecution asserted that the common thread connecting these episodes was a continuing agreement among respondents to "verify", or exchange competitive business information, for the purpose, and with the effect, of stabilizing prices. (Bill of Particulars 197-98.) In relying on verification as the sole common connecting thread, the prosecution itself squarely raised the fact issue of the "purpose" of price verification.

Although the trial court's instructions did not permit the jury to consider it, substantial evidence demonstrated that the limited verification which did occur was for a lawful purpose.[6] Each corporate respondent and other competitors (some of whom were not indicted) on occasion sought to verify with each other the truthfulness of a customer's claim of a competitive offer of a more favorable price, term, or other condition of sale. In the absence of sufficient data confirming the customer's claim, direct verification with competitors was regarded as legally important before extending a discriminatorily low price to the customer. Such verification avoided violations of the Robinson-Patman Act by satisfying its stringent requirements for establishing a "good faith meeting competition" defense. Also, verification protected the seller against customer fraud or misrepresentation. Abundant evidence demonstrated that respondents engaged in verification because their own individual legal counsel advised each

(Footnote continued from preceding page.)

(N.D. Cal. 1971) and related cases] which the Court of Appeals said "alleg[ed] essentially the same conspiracy charged here" (App. A at 22a). Adding emphasis to the staleness of petitioner's evidence is the fact that trial in the treble damage actions began in *October, 1969*, more than *four years* before the indictment in this case.

6. *See e.g.*, App. 2145a-2147a, 2551a-2552a, 2977a-2987a, 3032a-3036a, 3234a-3235a, 3402a-3403a and 3564a-3565a.

of them separately that verification was legally permissible.[7] Virtually all of the evidence on verification related to the period prior to the statute of limitations cut-off date.

In asserting that evidence was offered tending to show that respondents' price verification resulted in the stabilization of prices, the Petition continues the prosecution's emphasis upon the pre-statutory period (Petition 5, n. 4). On the contrary, the verification which did occur after 1968 was so isolated and infrequent it could not have had, and in fact did not have, a stabilizing effect on prices. The evidence of vigorous competition and price instability during the statutory period was overwhelming.[8]

7. As to USG, see App. 538a, 1179a-1180a, 3235a; as to National, see App. 1664a-1666a, 1898a-1901a, 3402a-3403a, 2133ex-2146ex; as to Georgia-Pacific, see App. 1289a-1290a; and as to Celotex, see App. 1794a-1797a, 3032a-3035a, 2977a-2980a.

8. Expert economic testimony confirmed an uncontradicted contemporaneous record of declining prices and increased discounting (App. 3084a-3169a). Dr. Richard Cyert, a distinguished economist and President of Carnegie-Mellon University (App. 2600ex-2605ex), testified that respondents had been engaged in "rampant price competition" during the entire statutory period, which was completely inconsistent with the claimed conspiracy (App. 3085a-3086a). That period was characterized by Dr. Cyert as one reflecting "a high degree of competition" that "verges on being disorderly" (App. 3093a-3094a) where the picture was one of "firms really scrambling, almost on a sale-by-sale basis to try to quote a price that is going to get that particular sale" (App. 3105a). Although the prosecution's expert, Dr. Richard A. Miller, testified for a second time on rebuttal after Dr. Cyert had given detailed findings of vigorous price competition, Dr. Miller did not dispute Dr. Cyert's data nor his conclusion that the gypsum industry was highly competitive throughout the statutory period (App. 3659a-3747a). Dr. Miller did *not* find any market behavior indicative of collusion, and did *not* provide any analysis or study of any economic data from which he believed even an inference of conspiracy might be drawn (App. 1942a-1958a), even though he had spent many months on leave from his professorship working at the prosecution's head office studying the gypsum wallboard industry (App. 1943a). Understandably, petitioner relies on abstract economic treatises, rather than the economic evidence and analyses presented at trial, in support of the economic theories propounded in the Petition.

REASONS FOR DENYING THE PETITION.

The Petition should be denied because (i) the "verification" issue does not warrant consideration by this Court; and (ii) the judgment below is not ripe for review since it can be sustained on numerous grounds which even petitioner asserts do not independently warrant review by this Court.

I.

THE "VERIFICATION" ISSUE DOES NOT WARRANT CONSIDERATION BY THIS COURT.

A. The Decision Below Is Consistent with Decisions of Other Circuits Reconciling the Sherman and Robinson-Patman Acts.

The Petition presents the question whether or not price verification for the purpose of establishing the "good faith meeting competition" defense under the Robinson-Patman Act is a *per se* violation of Section 1 of the Sherman Act. Petitioner concedes an absence of conflict among the courts of appeals on that question and indeed acknowledges the prior decisions, where *certiorari* was denied, to be even more expansive interpretations of the law than the decision below (Petition 9-10, n. 7).

Prior to the decision of the Court of Appeals for the Third Circuit, four federal courts had ruled that price verification between competitors is lawful if done for the purpose of satisfying the Robinson-Patman Act's "good faith meeting competition" defense. *Belliston* v. *Texaco, Inc.*, 455 F. 2d 175 (10th Cir. 1972), *cert. denied*, 408 U. S. 928 (1972); *Gray* v. *Shell Oil Co.*, 469 F. 2d 742 (9th Cir. 1972), *cert. denied*, 412 U. S. 943 (1973); *Webster* v. *Sinclair Refining Co.*, 338 F. Supp. 248 (S. D. Ala. 1971); *Wall Products Co.* v. *National Gypsum Co.*,

326 F. Supp. 295 (N. D. Cal. 1971). Each decision explicitly holds that the lawful purpose of meeting competition in good faith, as required by the Robinson-Patman Act, constitutes a "controlling circumstance" under *Cement Mfrs. Protective Ass'n.* v. *United States*, 268 U. S. 588 (1925), and *United States* v. *Container Corp. of America*, 393 U. S. 333 (1969), and that information exchanges or verification among competitors for that purpose are not violative of the Sherman Act.

B. The Decision Below Is Consistent with Prior Decisions of This Court on Price Information Exchanges.

The position taken by the lower federal courts is amply supported by the prior decisions of this Court. The proposition that all exchanges of competitive information automatically violate the Sherman Act regardless of their purposes, so long as their effect is to stabilize prices, has been squarely rejected by this Court. In *Cement*, which elaborated on the rule allowing price information exchanges announced the same day in *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U. S. 563 (1925), this Court upheld such exchanges, despite the trial court's express finding that they "tended to produce uniformity in price" (268 U. S. at 593).[9] The continuing vitality of cases such as *Cement* and *Maple Flooring* is established by this Court's recent reliance upon them. *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 782 (1975).

More recently, in a case the Petition fails to distinguish or even to cite, *United States* v. *Citizens & Southern Nat'l Bank*, 422 U. S. 86 (1975), this Court reaffirmed the fifty-year-old principle that "dissemination of price information is not itself a *per se* violation of the Sherman Act" (422 U. S. at 113), and

9. The Petition attempts to distinguish *Cement* by inaccurately characterising it as "quite unlike the present case, for it involved the exchange of price information about completed transactions, and the exchange had no effect upon price." (Petition 13.) *Cement*

(Footnote continued on next page.)

held that agreements to exchange information which result in the "lack of significant price competition" are nonetheless lawful when done for a "permissible reason". *Id.* at 113-114.[10] Since agreements to exchange competitive information are not *per se* offenses, evidence of "purpose" is critical and, as *Cement* and *C&S Bank* hold, sometimes controlling, because it often is the

(Footnote continued from preceding page.)
extended *Maple Flooring* by holding that reciprocal communications between competitors of the prices at which cement was sold under "specific job contracts" were permissible under the Sherman Act even where they related to specifically identified jobs and customers. Such exchanges were approved, despite the trial court's express finding that they "tended to produce uniformity in price" (268 U. S. at 593), because their purpose was to protect against buyer fraud (268 U. S. 603-04). The "specific job contracts" which were the subject of the exchange of price information in *Cement* were *not* completed transactions because the buyer had the option of taking delivery under them or not (268 U. S. at 594) and, on the basis of the trial court's express finding, this Court assumed that "the result of the gathering and reporting of such information tends to bring about uniformity in price." (268 U. S. at 604.) Since petitioner's erroneous reading of *Cement* is the basis for the alleged "conflict" between *Container* and the decision below, petitioner's argument on that point fails.

10. The *C&S Bank* decision explicitly relied on *Maple Flooring*, and the concurring opinion in *Container*. In *C&S Bank* the approved price information exchanges were "constant and detailed," and resulted in a lack of significant price competition between affiliated, but competing, banks. 422 U. S. at 113-14, 116. The government contended the exchanges constituted tacit price fixing condemned by *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), but this Court rejected a *per se* approach and determined that since the exchanges were justified by a "permissible" reason, they did not violate Section 1. 422 U. S. at 113-14.

Significantly, both the majority and dissenting opinions in *C&S Bank*, 442 U. S. at 116, 143, and the majority opinion in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, ___ U. S. ___, ___, 45 U. S. L. W. 4828, 4831 n. 15 (June 23, 1977), cite *Chicago Board of Trade* v. *United States*, 246 U. S. 231 (1918) (Opinion of the Court delivered by Brandeis, J.), as the appropriate standard. That standard specifically included "the purpose or end sought to be attained" among the "relevant facts" to be considered in determining whether or not a particular restraint violates the Sherman Act (246 U. S. at 238), and frowns on a *per se* approach.

only element separating lawful from unlawful information exchanges.[11]

The *Container* decision does not establish a *per se* rule condemning exchanges of competitive information which result in stabilized prices. *United States* v. *Container Corp. of America*, *supra*, 393 U. S. at 338-39 (concurring opinion). *Container* establishes that exchanges of price information for legitimate purposes are not illegal, even if the exchanges result in a stabilizing effect on prices (393 U. S. at 335). In striking down the *Container* exchanges, this Court recognized that such exchanges might be lawful under certain "controlling circumstances," such as those present in *Cement*, but found those circumstances to be absent (393 U. S. at 335). The *Container* decision thus considered both the purpose and effect of the exchanges in reaching its conclusion. Similarly, the jury in this case should also have been permitted to consider purpose and effect. Recognizing that principle, the Court of Appeals held that it was error for the trial court to preclude the jury from considering the purpose of the limited exchanges involved here.

C. The "Verification" Issue Cannot Be Isolated from the Trial Court's Erroneous Instruction Requiring the Jury to "Presume" Respondents' Unlawful Purpose.

In arguing that the verification issue presents an "important question" for Supreme Court review, the Petition focuses not on the erroneous trial instruction, on the basis of which respondents were convicted, but rather on abstract considerations of antitrust law. But it is the trial court's instruction which must

11. In arguing that purpose is irrelevant in a price-fixing case, the prosecution fails to distinguish between the immediate purpose of concerted action which characterizes it as a *per se* offense (e.g., a purpose to fix prices) and the attempted justification once price-fixing has been established (e.g., fixed prices were fair and reasonable) (*See*, Petition 12, 13). The issue in this case is not whether price-fixing is justified by "benign motives", but whether there was price-fixing in the first place.

be sustained if the Court of Appeals' decision is to be reversed. Because of the trial court's erroneous instruction, this is not an appropriate case in which to attempt the delicate task of reconciling the nation's antitrust laws.

The prosecution itself made the issue of purpose the critical question of fact for the jury. In its Bill of Particulars and at trial, the government contended that price verification was the connecting link among diverse elements of the alleged conspiracy, engaged in for the purpose of policing the conspiracy and to fix or stabilize prices. (Bill of Particulars 197-98; Tr. 210-11, 221-22, 244-45, 248.) This asserted unlawful purpose for verification was critical to the prosecution's case because of the disjointed nature of its proof and severe statute of limitations problems. Yet, after the prosecution had emphasized its theory of improper purpose for 19 weeks, the trial judge's instructions effectively prohibited the jury from considering respondents' substantial evidence of lawful purpose.

At the trial's close, the prosecution confirmed its belief that an unlawful purpose for verification was an essential element of a Section 1 violation. Thus, the prosecution's request to charge recognized that, under *Container*, it had the burden to establish beyond a reasonable doubt "that the purpose of these exchanges was for reasons other than to ensure compliance with the Robinson-Patman Act" (Gov't. Req. 15c, App. 4158a-4167a).

The government asked the trial court to charge:

> However, if you find that the *purpose* of these exchanges was for reasons other than to ensure compliance with the Robinson-Patman Act, then you may consider these exchanges as evidence of the mutual agreement or understanding alleged in the indictment to maintain or stabilize prices. [App. 4161a-4162a (emphasis added).]

The trial court changed the prosecution's Request 15c by substituting "effect" for "purpose" and instructed the jury:

> However, if you decide that the *effect* of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these [exchanges] as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain, and stabilize list prices.
>
> • • • • •
>
> . . . If the *effect* of such exchanges was to raise, fix, maintain or stabilize prices, then an agreement to engage in such an exchange is a violation of the Sherman Act, *regardless of the specific purpose* that the parties to the agreement had in their minds. That is because the Sherman Act does not require proof of a specific purpose to restrain trade in order to establish the offense.
>
> The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the *effect* of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are *presumed, as a matter of law,* to have intended that result." [App. 3884a-3885a (emphasis added).]

Faced with this erroneous and prejudicial direction to the jury, the Court of Appeals held, consistent with the long line of decisions in this Court and others, that the trial court's "refusal to instruct the jury about the relevance of purpose" constituted reversible error (App. A 13a). The opinion of the Court of Appeals did not, as the Petition contends, create a defense that is detrimental to the aims of the Sherman Act (Petition 9), but held merely that the jury should have been permitted to consider a narrow "controlling circumstance" exception recognized by *Container* (App. A 29a).

Respondents had all been advised by their respective legal counsel that price verification was a permissible practice in order to meet requirements of Robinson-Patman's "good faith meeting competition"' defense. Abundant evidence was introduced at trial to show that this was in fact the purpose for the limited verification which actually occurred (most of it prior to the statute of limitations period). Yet the trial court instructed the jury to ignore respondents' actual purpose and, if it found a price stabilizing *effect* from such verification, to "*presume, as a*

matter of law," that respondents' purpose for verification was to fix prices. "Such incriminating presumptions are not to be improvised by the judiciary." *Morissette* v. *United States*, 342 U. S. 246, 275 (1952).

Because the trial court gave a novel "presumption of unlawful purpose" instruction, this case is not an appropriate vehicle for reconciling the nation's antitrust laws. Review of this issue is particularly inappropriate because the prosecution itself, in arguing that respondents' purpose was in fact unlawful, made respondents' purpose an essential element of the violation.

D. Petitioner's View of the Legality of Price Information Exchanges May Not Be Applied Retroactively to Respondents' Conduct.

Despite the prior unequivocal holdings sanctioning respondents' conduct, the prosecution continues to seek to sustain respondents' convictions on the ground that the decision below creates a new "defense" that is detrimental to the purposes of the Sherman Act (Petition 9). Criminal liability may not constitutionally be imposed for conduct which was consistent with years of precedent in this Court and which had been expressly approved by four lower federal courts prior to return of the indictment. Such unexpected judicial enlargement of the definition of a crime would deny due process of law.

Bouie v. *City of Columbia*, 378 U. S. 347 (1964), held that convictions based on judicial construction of a statute, announced after the incident giving rise to the convictions, deprived defendants of their right to fair warning. This Court held in *Marks* v. *United States*, ____ U. S. ____, 51 L. Ed. 2d 260 (1977), that due process precluded retroactive application of obscenity standards announced after the conduct for which petitioner was prosecuted. The same result was reached on the grounds of generally accepted judicial standards of fairness in *Lemon* v. *Kurtzman*, 411 U. S. 192 (1973). *See generally*, Joint

Petition for a Writ of Certiorari of Respondents Colon Brown and J. P. Nicely, October Term, 1976, No. 76-1556, at 24-32.

The argument against retroactive application of the rule sought by the prosecution here is particularly strong in a Sherman Act Section 1 case, where challenge to the statute on grounds of vagueness has been rejected based on a long history of consistent judicial construction. *See, e.g., Standard Oil* v. *United States*, 221 U. S. 1, 63-70 (1911), and *Nash* v. *United States*, 229 U. S. 373, 377-78 (1913). Unlike *Bouie*, which involved "unforeseeable and retroactive judicial expansion of narrow and precise statutory language" (378 U. S. at 352), these respondents may be faced with "unforeseeable and retroactive judicial expansion" of earlier judicial interpretation of *broad, vague* statutory language. The need for non-retroactivity is at least as compelling in the instant situation as in *Bouie* and *Marks*, in view of the policy of fundamental fairness which underlies the doctrine. Because petitioners' view of the law could not be applied retroactively to respondents, this is not an appropriate case for review.

II.

A MULTITUDE OF TRIAL ERRORS SUPPORTS THE COURT OF APPEALS' REVERSAL OF RESPONDENTS' CONVICTIONS, AND WARRANTS DENIAL OF THE PETITION.

The judgment of the Court of Appeals can be sustained on many grounds, each of which would have to be decided adversely to respondents before a different result could be reached. Thus, the grant of *certiorari* would immerse this Court in myriad issues that even petitioner asserts do not independently warrant Supreme Court review.

Petitioner recognizes that, if review of the verification issue is granted, this Court must necessarily address at least three other criminal procedure issues in order to avoid retrial (Petition 16-20). Though the concept is correct, the count is wrong. There are numerous other grounds for reversal of respondents'

convictions which the Court of Appeals found it unnecessary to reach because it reversed and remanded for a new trial. Were this Court to become involved at this interlocutory stage of the proceedings, treatment of those issues would be required without prior consideration in the Court of Appeals.

Where a matter has been remanded for a new trial, such considerations usually lead this Court to deny certiorari because the case "is not yet ripe for review." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad*, 389 U. S. 327, 328 (1967) (*per curiam*). Lack of finality, in itself, is sufficient ground for denial of review. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 257-58 (1916). Such exceptions as are made to this principle usually occur in civil, not criminal, cases. *See, e.g., United States* v. *General Motors Corp.*, 323 U. S. 373 (1945).

The many issues which require reversal of respondents' convictions, and which sustain the judgment of the Court of Appeals, are:

A. Verdict Coerced from a Deadlocked Jury.

The trial judge improperly coerced the verdict by conveying to the jury that a deadlock was impermissible. *Jenkins* v. *United States*, 380 U. S. 445 (1965). Judge Adams' opinion sets forth the facts which in his view warrant reversal on this issue (App. A 40a-45a).

The cumulative coercive impact of several "dynamite" charges over seven days of intense deliberations, by a jury which had twice reported itself hopelessly deadlocked, was capped by a conference of the trial court with the jury foreman from which defendants and their counsel were excluded. During that conference, after confirming that the jury was "hopelessly deadlocked," the trial judge improperly communicated to the jury through the foreman that a deadlock was impermissible by indicating the jury had no alternative except a verdict "one way

or the other" (App. A 43a-44a). Such an instruction given outside the presence of defendants and their counsel is by itself sufficient grounds for reversal. *Rogers* v. *United States*, 422 U. S. 35 (1975).

By suggesting to the foreman that one juror could be excused "for health reasons," the trial court graphically conveyed its view that a deadlock was unacceptable and that it could be broken by excusing the holdout. The subject was dropped by the court upon hearing that more than one juror might have to be excused.[12] Moreover, the trial court prevented counsel from protecting their clients' rights to a fair trial by impounding the transcript of the conference with the foreman, by failing to give counsel an "accurate or even substantially accurate" report on discussions between the court and the foreman (App. A 44a-45a), and by prohibiting defendants' counsel from interviewing or even accepting volunteered statements from the jurors after the verdicts were returned (App. 4037a-4039a).

Judge Adams' review of these events leaves no doubt that respondents' convictions were not the product of reasoned consideration by the jury of "any document [or] remembrance of testimony", but of coercion by the trial judge, and that the jury's verdict was, as the foreman predicted, not a "true and just verdict" (App. 4066a-4067a).

B. Refusal to Give Requested "Scope and Purpose" Instruction.

The trial court refused to instruct the jury on the need to determine the scope and purpose of the alleged conspiracy

12. The entire exchange on this point is as follows:

THE COURT: May I ask this: if we discharged—we can excuse one juror for health reasons. Is there any juror we could excuse that would help the situation? *If it is more than that, there is no point.*

MR. RUSSELL: I think there is more than that, Judge. (App. 4065a-4066a emphasis added).

Respondents previously had stipulated to a verdict by eleven jurors.

as to each defendant. *United States* v. *Borelli*, 336 F. 2d 376 (2d Cir. 1964), *cert. denied*, 379 U. S. 960 (1965). Judge Hunter held that the great number of activities in evidence and the large cast of characters involved made it essential to impress upon the jury that each defendant could be found guilty of the conspiracy charged only if the overall design charged in the indictment was within each defendant's reasonable contemplation if and when he engaged in any of the isolated activities.[13]

C. Erroneous "Withdrawal" Instruction.

The trial court's charge incorrectly restricted the jury's consideration of respondents' withdrawal from the alleged conspiracy to only two possibilities: (1) direct announcement of withdrawal to each other alleged co-conspirator, or (2) disclosure to law enforcement authorities. Judge Hunter held that such limitations improperly excluded other possibilities of withdrawal such as conduct inconsistent with continued adherence. This error was especially prejudicial in light of evidence of cessation by some respondents of verification prior to or early in the statute of limitations period, and in light of the uncontroverted evidence of vigorous price competition among all respondents during the entire statutory period.[14]

13. Judge Adams agreed with Judge Hunter's view of the law on the "scope and purpose" and "withdrawal" instructions, since he stated "the district court could do well to incorporate in its charge, on remand, the suggestions set forth by Judge Hunter." (App. A 50a.) Judge Adams did not join Judge Hunter in basing reversal on these points, not because he thought them unnecessary, as the Petition asserts (Petition 17, n. 19), but because in "context" Judge Adams thought it questionable whether the erroneous charge on these issues was so prejudicial as to constitute "reversible error".

14. Judge Zirpoli held in *Wall Products Co.* v. *National Gypsum Co.*, 326 F. Supp. 295, 327-28 (N. D. Cal. 1971) that even the limited conspiracy which he found in a civil case from circumstances surrounding the announcement of price and terms changes in 1965 and 1966 was completely dissipated no later than January 1, 1968.

D. Refusal to Give a "Kotteakos" Instruction.

The trial court refused adequately to instruct the jury that proof of several separate and distinct conspiracies is insufficient to prove the unitary conspiracy charged in the indictment. ***Kotteakos*** v. *United States*, 328 U. S. 750 (1946). The disjointed and episodic character of the prosecution's evidence and the severe statute of limitations problem made the failure to give a *Kotteakos* instruction particularly prejudicial.

E. Prosecutorial Misconduct.

Prosecutorial misconduct deprived respondents of a fair trial. The prosecutor argued to the jury "facts" outside the record, and misstated or misconstrued evidence which was in the record. *Berger* v. *United States*, 295 U. S. 78, 85-88 (1935). The prosecutor even fabricated an exhibit. (App. 1431a-1433a; 1484a-1488a.) He argued to the jury that the individual respondents had to fix prices in order to keep their jobs (App. 3779a). *Viereck* v. *United States*, 318 U. S. 236, 247-48 (1943). He suggested to the Pittsburgh jury that respondents engaged in strike-breaking (App. 1694a), a tactic for which the same prosecutor had previously been admonished (See *United States* v. *American Radiator & Standard Sanitary Corp.*, 433 F. 2d 174, 207-10 (3d Cir. 1970) (Aldisert, J. dissenting).

F. Other Erroneous Instructions and Failure to Comply with Federal Criminal Rule 30.

The trial court gave several other seriously erroneous instructions, the prejudicial nature of which was increased by the court's failure to inform defense counsel in advance of its instructions as required by Rule 30, F. R. Crim. P., so that they could properly argue the case to the jury. *Ross* v. *United States*, 180 F. 2d 160, 165-66 (6th Cir. 1950), *cert. denied*, 344 U. S. 832 (1952); *United States* v. *Crescent-Kelvan Co.*, 164

F. 2d 582, 589 (3d Cir. 1948). As an example of its erroneous instructions, the trial judge refused to instruct the jury on the relevance, in a criminal case, of legal advice given to defendants in determining the purpose of their price information exchanges.

G. Seriously Prejudicial Evidentiary Rulings.

The trial court improperly admitted hearsay documents in disregard of the business record rule whenever any witness (with or without knowledge of the document) merely testified that it was subpoenaed from company files. (Tr. 7577-7581.) *Rivers* v. *Union Carbide Corp.*, 426 F. 2d 633 (3d Cir. 1970). Prejudicial hearsay testimony was also received from a key prosecution witness who was permitted to testify to what third parties told him concerning respondents' actions, in the absence of any evidence connecting the third parties to the alleged conspiracy (Tr. 2690-2692; App. 942a-944a; Tr. 10307). *Dutton* v. *Evans*, 400 U. S. 74 (1970). The prosecution was permitted to make reference to prior lawsuits and complaints to the government which involved only some of the respondents, and which were inflammatory and irrelevant. (*See, e.g.*, Tr. 1253-1256; App. 760a-761a, 1032a-1033a, 1035a-1037a, 1685a-1687a.) *Hurst* v. *United States*, 337 F. 2d 678 (5th Cir. 1964). The trial court erroneously allowed, over objection of some defendants, reading to the jury of prejudicial grand jury testimony of a deceased employee of a non-defendant relating to an incident occurring eight years before the statute of limitations period, which deprived respondents of their "constitutional right of cross-examination." (App. 963a-977a.) *Bruton* v. *United States*, 391 U. S. 123, 137 (1968). The court also admitted, over objection, misleading evidence of one defendant's legitimate disposition of documents pursuant to long-established document retention policies (Tr. 6569-6573; Tr. 6723-6726; App. 1810a-1814a; Tr. 11673-11676).

CONCLUSION.

A case such as this, involving 15,000 transcript pages and 6,000 documents, which fairly bristles with myriad, complex issues, cannot, at this intermediate stage, be ripe for review on *certiorari*. There is no single issue of nationwide importance which will resolve the rights of the parties without further proceedings.[15] Accordingly, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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15. Respondents Brown and Nicely have filed a Joint Petition for a Writ of Certiorari (No. 76-1556, October Term, 1976) raising the separate issue of the sufficiency of the evidence on which they were convicted. Their opposition to the government's Petition herein is not in conflict with their own Petition, since the government's Petition is based on wholly different grounds.